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No. 88-1565

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD ALAN LEEMIS,

Petitioner,

v.

HOSPITAL CORPORATION OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a 32-year old plaintiff is within the class of persons protected by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634, despite the express provision contained in 29 U.S.C. § 631(a) that the application of the Act "shall be limited to individuals who are at least 40 years of age."

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit appear in the caption of the case in this Court.*

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* Pursuant to Supreme Court Rule 28.1, Hospital Corporation of America has no parent corporation, subsidiaries (except wholly-owned subsidiaries) or affiliates.

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Respondent Hospital Corporation of America respectfully urges denial of the Petition for a Writ of Certiorari to review the judgment and order entered by

the United States Court of Appeals for the Sixth Circuit on November 21, 1988.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

This case arises under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634. 29 U.S.C. § 631(a) provides that:

> The prohibitions in this chapter (except the provisions of section 623(g) of this title) shall be limited to individuals who are at least 40 years of age.

STATEMENT OF THE CASE

A. Statement of Facts

On January 14, 1987, Richard A. Leemis, at the time a 32-year old Process

Development Analyst, was terminated from his employment with Hospital Corporation of America ("HCA"). On September 25, 1987, Leemis filed a charge of discrimination with the Tennessee Human Rights Commission and the Equal Employment Opportunity Commission ("EEOC"), alleging that his employment had been terminated due to his age in violation of the Age Discrimination in Employment Act ("ADEA"). On December 21, 1987, the EEOC dismissed the charge for lack of standing.

B. The Course of Proceedings And Disposition In The Courts Below

On January 29, 1988, Leemis filed a complaint in the United States District Court for the Western District of Tennessee, Western Division, asserting that HCA had wrongfully discharged him, breached his employment agreement,

inflicted emotional distress upon him, defamed him, interfered with his prospective economic advantages and misrepresented material facts to him. On February 23, 1988, HCA filed a motion to dismiss the complaint for lack of subject matter jurisdiction. Leemis then amended his Complaint to add a count specifically alleging that he had been discriminated against on the basis of his age in violation of the ADEA. HCA thereafter renewed its motion to dismiss, noting that Leemis was only 32-years old and therefore not covered by the ADEA.

In an order dated April 7, 1988, the District Court dismissed both the original and the amended complaints for lack of subject matter jurisdiction. As the ADEA claim was the sole basis for invoking the District Court's jurisdiction, no subject

matter jurisdiction existed since Leemis' age rendered his federal cause of action baseless. On November 21, 1988, the United States Court of Appeals for the Sixth Circuit affirmed.

REASONS FOR DENYING THE WRIT

Consideration of the question raised by the Petition is wholly unwarranted. No conflict of any sort exists among the courts, nor is any significant question of federal law involved. Rather, the legislature has unequivocally declared in the statute itself that persons less than forty years old are not covered by the ADEA except in certain limited circumstances not pertinent here. The Courts below simply applied the unambiguous language set forth in the Act in the same

manner as every other court faced with the issue.

Employees under forty claiming to have been discriminated against because of their age have no viable claim under the ADEA. Crane v. Schneider, 635 F. Supp. 1430, 1434 (E.D.N.Y. 1986); Kodish v. United Airlines, Inc., 463 F. Supp. 1245, 1249 (D. Colo. 1979), aff'd, 628 F.2d 1301 (10th Cir. 1980). Only individuals who are 40 years of age or older can pursue a substantive claim of age discrimination. Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985); Settino v. City of Chicago, 642 F. Supp. 755 (N.D. Ill. 1986).

The sole decision relied on by Leemis in support of his position that coverage under the ADEA should be extended to persons of all ages, Merkel v. Scovill,

Inc., 787 F.2d 174 (6th Cir.), cert. denied, 479 U.S. 990 (1986), arose under Section 4(d) of the Act, 29 U.S.C. §§ 623(d), prohibiting an employer from discriminating "against any of his employees . . . because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." The plaintiff in Merkel claimed to have been discharged in retaliation for refusing to execute an affidavit in conjunction with the employer's investigation of an age discrimination charge filed by another employee. As he had failed to demonstrate that his employer knew or had reason to believe that the proposed affidavit was false, the Court entered judgment in favor

of the employer on the ADEA claim and did not address the applicability of Section 4(d) to individuals under the age of forty. Regardless of whether the anti-retaliation provisions of the Act apply to persons less than forty years old, however, the substantive provisions plainly do not, and Leemis has no cognizable claim.

The legislature has determined that only those persons over the age of 40 are entitled to protection against discrimination on account of their age under the ADEA, and Leemis is not within the protected group. He has no actionable age discrimination claim, and the Courts below properly dismissed his complaint. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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